

**Testimony before the Select Committee on the Modernization of Congress
United States House of Representatives**

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***Article One:
Restoring Capacity and Equipping Congress to Better Serve the American People***

January 14, 2020

Chairman Kilmer, Vice-Chairman Graves, and Members of the Select Committee: thank you for the opportunity to testify before the committee. My name is Rachel Potter and I am an Assistant Professor of Politics at the University of Virginia.¹ I am also an alumna of the Office of Management and Budget, where I worked on regulatory policy issues.

While today's hearing focuses on congressional capacity, my testimony focuses on changes in the capacity of the executive branch over time. Among scholars, there is consensus that the executive branch has amassed considerable influence from its modest standing at our nation's founding. Today, the executive branch is sophisticated, complex, and large. It is comprised of millions of people engaged in a diverse set of tasks. Much of the transformation in this branch of government has occurred since World War II, a period described by scholars as the "modern presidency." Accordingly, my testimony will focus on three major aspects of growth in the post-war period:

- First, the federal bureaucracy experienced dramatic growth in both policymaking and implementation capacity during this period;
- Second, and concurrently, the powers of the office of the presidency expanded; and
- Third, numerous factors gave rise to these trends.

The sections that follow elaborate on these themes in greater detail.

1. *The federal bureaucracy has experienced dramatic growth in both policymaking and implementation capacity.*

What began in the first Congress as a modest Cabinet with just three departments,² has grown to fifteen Cabinet-level departments. As the government—and the

¹ The views expressed herein are my own and do not represent the University of Virginia.

² The three Cabinet departments were State, Treasury, and War, renamed Defense in 1947. See, Oleszek, Walter J. 2010. "Congressional Oversight: An Overview" Congressional Research Service, Report #7-5700, Washington, D.C.

people’s expectations for it—have grown, most of this responsibility and capability have aggregated to the executive branch. Between 1946 and 1997, an average of eight new agencies was created each year.³ While there is no official inventory of federal agencies, one recent count puts the current total at 278 distinct agencies in the executive branch.⁴ Most of these agencies were created via legislation passed by Congress, but others were created by the executive itself through a departmental order, executive order, or a reorganization plan. While it is not true that bureaucratic agencies never “die,” once created, the majority do endure, although often in modified form.

The federal bureaucracy does everything from evaluate the safety of pharmaceuticals to respond to emergencies to print money. The complexity and diversity of the executive branch’s tasks are reflected in the numerous occupations held by its personnel: correctional officer, park ranger, historian, accountant, veterinarian, civil engineer, policy analyst, librarian, metal worker, and aviation safety specialist, among others.

Growth in the capacity of the executive branch is also reflected in its output. Between 1946 and 2018, the *Federal Register*, the executive branch’s official daily publication, increased more than four-fold in terms of the number of pages.⁵ While this metric does not tell us much about increases in particular policymaking activities (e.g., executive orders versus proposed rules),⁶ it does give a crude indication that the total activity level of the bureaucracy has increased across time.

The overall volume of administrative rulemaking also indicates the increased capacity and reach of the executive branch across time. At the beginning of the 20th century rulemaking was a relatively infrequent activity;⁷ however, today it is a routine part of the administrative state. Notably, many rulemakings expand and entrench both the responsibilities and capabilities of the executive branch.

³ Figures compiled from Lewis, David E. 2003. *Presidents and the Politics of Agency Design* Stanford, CA: Stanford University Press.

⁴ See Selin, Jennifer L. and David E. Lewis. 2018. *Sourcebook of United States Executive Agencies*, 2nd ed. Administrative Conference of the United States, Washington, D.C. Counts may vary depending on how the term “agency” is defined. For example, the *Federal Register* listed 414 unique agencies in 2019.

⁵ Office of the Federal Register. 2019. “Federal Register Pages Published, 1935-2018.” Washington, D.C.

⁶ Because the *Federal Register* is the government’s daily digest, it includes all manner of documents pertaining to government business. These include executive orders, agency proposed and final rules, memoranda, agency notices about public meetings and privacy practices, among others. Thus, it is inaccurate to infer changes in particular policymaking activities from page totals, but page totals do offer insight—albeit rough—into the volume of bureaucratic activity.

⁷ See Potter, Rachel Augustine. 2019. *Bending the Rules: Procedural Politicking in the Bureaucracy* Chicago, IL: University of Chicago Press, chapter 2.

Figure 1. Number of Proposed and Final Rules, 1976 - 2018⁸

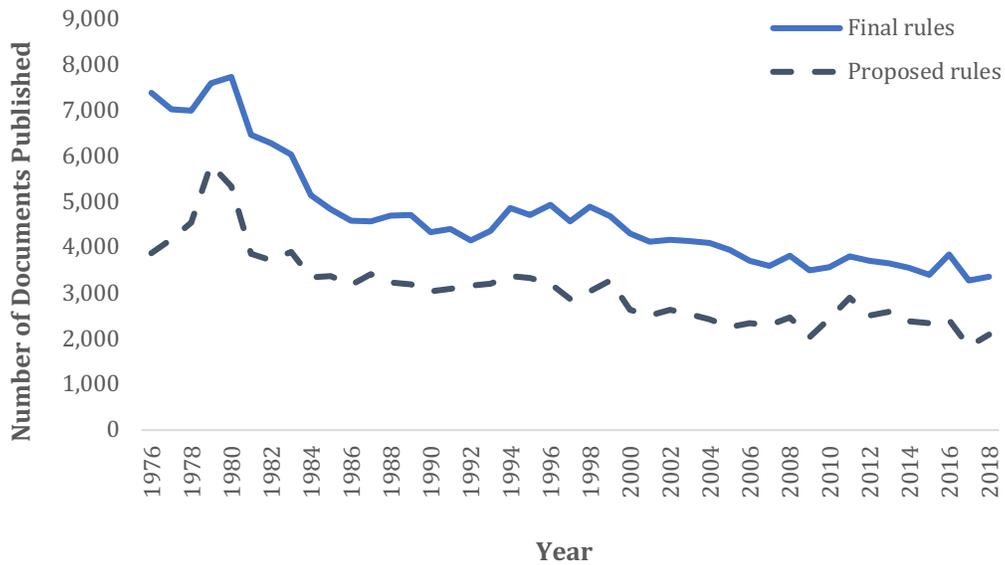
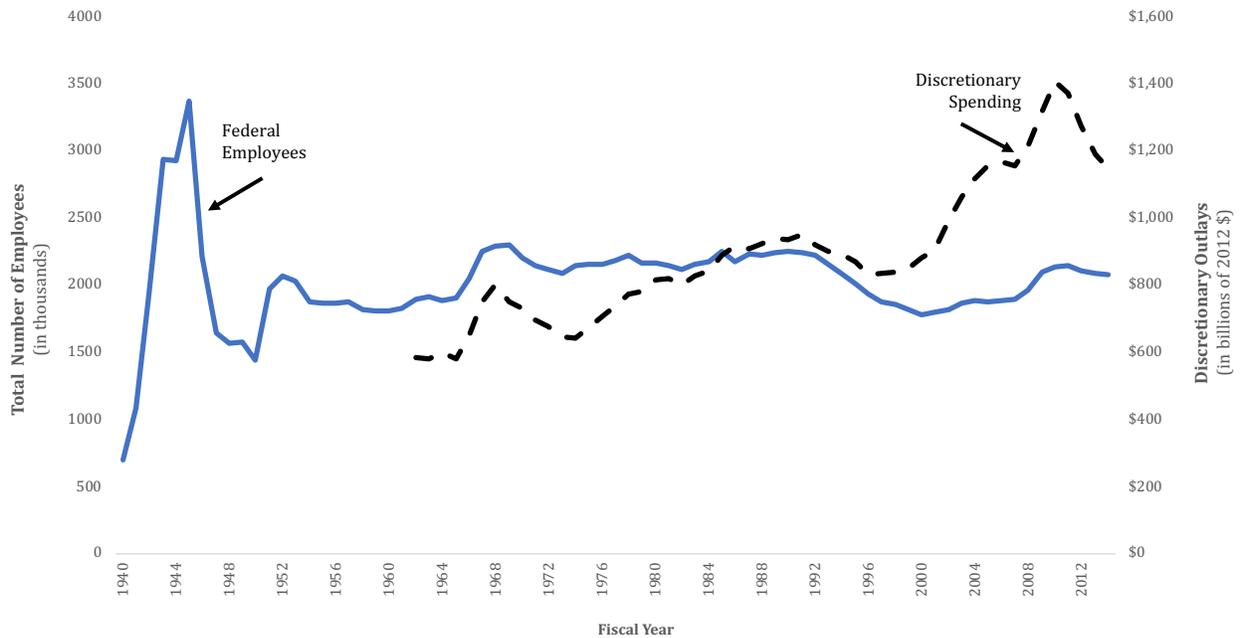


Figure 1 shows the number of proposed and final rules issued between 1976 and 2018. In recent years, agencies have issued between 2,000 and 3,000 proposed rules and approximately 3,000-4,000 final rules each year. Each of these rulemakings requires significant agency work in terms of research, analytical requirements, and legal review. Once finalized, rules must be implemented and enforced. In a cumulative sense, then, this figure gives us a sense that there has been an inexorable increase in the size and scope of executive function over the past 40 years.

While federal discretionary spending has steadily increased over time to accommodate these new demands on government, there have not been corresponding increases in the number of federal employees. As shown in Figure 2, civilian employment has hovered at approximately two million employees for the last 70 or so years.

⁸ Office of the Federal Register. 2019. "Federal Register Documents Published, 1976-2018." Washington, D.C.

Figure 2. Trends in Executive Branch Civilian Employment and Federal Discretionary Spending, 1940 – 2014⁹



At first glance, this may seem confusing—how is it that the executive branch is accomplishing so much more without commensurate increases in staffing? Much of the answer lies in an increased reliance on the private sector to accomplish governmental tasks. Although there is no official accounting of contractors employed in the service of the federal government, by one estimate there were three federal contractors for every one federal employee in 2017.¹⁰ This means that although the size of the executive branch workforce may appear steady on paper, in practice it has grown dramatically in a less visible way.

⁹ Personnel data are from the Historical Federal Workforce Tables from the Office of Personnel Management. More recent data from the OPM’s FedScope database indicates that, as of September 2018, total federal employment remained at a similar level. Federal discretionary spending data are adjusted for inflation and draw from the Office of Management and Budget’s Historical Tables, Table 8.8 “Outlays for Discretionary Programs in Constant (FY 2012) Dollars.”

¹⁰ See Light, Paul C. 2018. *The Government Industrial Complex: The True Size of the Federal Government 1984-2018* New York, NY: Oxford University Press, p. 38. Light estimates that the aggregate federal workforce (i.e., a count that includes both federal employees, contractors, and grantees) was about 7 million people in 2017. DiIulio estimates it to be even larger—approximately 14 million people; see DiIulio, John C. 2017. “10 Questions and Answers About America’s ‘Big Government,’” Feb. 13. *Brookings institution*.

2. *There has been a concurrent expansion in the powers of the presidency.*

At the same time that the federal bureaucracy has grown, the office of the president has seen a significant expansion in its ability to make policy. Four elements of this trend are worth noting.

First, presidents have increasingly relied on unilateral actions—not involving the Congress—to accomplish policy goals. Scholars generally classify presidential unilateral actions into six categories: executive orders, memoranda, presidential proclamations, signing statements, executive agreements, and national security directives. Executive orders receive the lion's share of public attention and have been used to achieve major policy changes. For example, Executive Order 12291 issued by President Reagan in 1981 established a centralized regulatory review program in the Office of Management and Budget, which persists to this day, albeit in modified form.

While individual presidents may rely more on some tools than others, the overall portrait is one of consistent over-time growth in unilateral action. For example, executive agreements, which do not require the Senate's ratification, now vastly outnumber treaties, which do require Senate ratification. This has not always been the case.¹¹

Second, the presidency has amassed increased powers with respect to both wars and emergencies. Despite congressional attempts to limit unilateral authority in this area, the executive branch retains tremendous autonomy when it comes to deploying troops and conducting military operations abroad. While political scientists have shown that Congress does check the president's war powers—particularly in the face of divided government and a strong opposition party—the president's powers at wartime remain formidable.¹² With respect to emergencies, the specific powers granted to the president have grown over time. These authorities cover numerous policy areas, including ones with an indirect relationship to emergencies such as mail delivery, land use, and federal pay schedules. Compounding this growth in power, there is generally broad latitude in how an emergency is defined, which gives the president considerable discretion in deploying emergency powers.¹³

Third, the president's policymaking, advisory, and supervisory capabilities have also grown substantially. The Executive Office of the President (EOP) was created in

¹¹ For example, the ratio of executive agreements to treaties was 2.8 to 1 during Franklin D. Roosevelt's administration, but had jumped to 14.7 to 1 by George W. Bush's administration. See Stanley, Harold W. and Richard G. Niemi. 2015. *Vital Statistics on American Politics 2015-2016* Washington, D.C.: CQ Press, p. 326.

¹² See, e.g., Howell, William G. and Jon C. Pevehouse. 2007. "When Congress Stops War: Partisan Politics and Presidential Power" *Foreign Affairs* 86(5): 95-107.

¹³ Halchin, L. Elaine. 2019. "National Emergency Powers" Congressional Research Service, Report #98-505. Washington, D.C.

1939 and initially had just four units, including the White House Office and the Bureau of the Budget (now called the Office of Management and Budget).¹⁴ Over time, new units have been added to the EOP such as the Domestic Policy Council (added by the President Nixon), the Economic Policy Board (added by President Ford and now called the National Economic Council), and the Office of National Drug Control Policy (added under President George H. W. Bush's tenure). Today, the EOP has a staff of approximately 2,000 people.¹⁵ This administrative organ provides the president with a sophisticated ability to develop new policies and manage the executive branch.

Fourth and finally, presidents can supplement their policymaking and management capabilities on an ad hoc basis through mechanisms such as policy czars. Policy czars are leaders given a substantial policy coordination role by the president; they expand presidential influence by sidestepping both congressional oversight (since they are not subject to Senate confirmation) and bureaucratic inertia. While the czar role was infrequently used in the immediate post-WWII years, it has become more common in recent administrations. For instance, in his first three years in office, President Obama appointed 54 policy czars, including a Car Czar and an Ebola Czar.¹⁶

3. *Numerous factors have contributed to these trends.*

It is important to note that the growth of the executive branch, both in terms of bureaucratic capacity and presidential power, is not associated with one party; rather, these trends have persisted under both Democratic and Republican administrations. At times presidents have actively sought to expand the powers of their office and, at others, Congress has willingly ceded power to the executive branch. Several factors have contributed to these trends.

First, domestic and international crises have expanded the reach of the executive branch. Observers have long noted that war is associated with an expanded presidential prerogative. Simply put, crises require a coordinated federal response and the executive is better positioned to fulfill that central coordinating function. Information asymmetries between the executive and legislative branches in the heat of international and domestic crises further this advantage. Over time these situations aggregate to allow the executive to accrue power. For example, following the 9/11 attacks, the Food and Drug Administration, the Department of Agriculture,

¹⁴ Relyea, Harold C. 2008. "The Executive Office of the President: An Historical Overview" Congressional Research Service, Report #98-606. Washington, D.C.

¹⁵ Budget of the United States Government, FY 2019.

¹⁶ See Howell, William G. 2017. *An American Presidency: Institutional Foundations of Executive Politics* New York, NY: Pearson Education, pp. 257-258.

and the Environmental Protection Agency all assumed new functions relating to bioterrorism prevention.¹⁷

Second, complexity contributes to the aggrandizement of executive power. Setting air pollution standards or determining how to best work with partner organizations to administer foreign aid requires specialization and expertise. The executive branch has both the capacity and personnel to deal with cross-cutting issues and to give sustained in-depth attention to hard problems. This means that as new issues and problems emerge—such as the swine flu virus or new social challenges—it is the executive branch that has historically been well situated to manage and respond to them.

Third, political polarization also magnifies the power of the executive branch. Partisan polarization can impede the productivity and routine functioning of Congress.¹⁸ When Congress does not act, the executive often steps in. For instance, President Obama’s now famous “I’ve got a pen and I’ve got a phone” remark, which preceded a series of unilateral actions, was premised upon a deadlocked Congress.¹⁹ In the face of congressional inaction, bureaucratic agencies also provide policy direction, through rulemaking and other policy actions.

Before concluding, allow me to highlight two important features about the capacity of the executive branch that are relevant to your inquiry.

First, important metrics pertaining to the executive branch, including the number of agencies and the number of contractors employed in the federal service, are not officially tracked. Many of the figures I present here are collected or estimated by observers outside government with imperfect access to information. In considering changes to oversight of the executive, gathering better data would be a reasonable place to start.

Second, given the growth of the United States and what the country’s citizens expect from their government, capacity must lie somewhere. Scholars often use the term “expert” to refer to the policy analysts and bureaucrats that staff the executive branch. While oversight of the executive branch is a part of our constitutional design, individual bureaucrats and the capabilities that they embody ought to be considered allies in the quest to improve public policy.

¹⁷ Carpenter, Daniel. 2005. “The Evolution of National Bureaucracy in the United States” in *The Executive Branch* eds. Joel D. Aberbach and Mark A. Peterson. New York, NY: Oxford University Press.

¹⁸ Lee, Frances E. 2015. “How Party Polarization Affects Governance,” *Annual Review of Political Science* 18: 261-282.

¹⁹ Keith, Tamara. 2014. “Wielding a Pen and a Phone, Obama Goes It Alone,” Jan. 20. *NPR News*.

Abridged CV

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Education

Ph.D. 2014 University of Michigan, Public Policy and Political Science

M.A. 2011 University of Michigan, Political Science

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B.A. 2001 Boston College, *Magna Cum Laude*, *Phi Beta Kappa*

Academic Appointments

Assistant Professor, Department of Politics, University of Virginia, 2014–present

Fellow, Center for the Study of Democratic Politics, Princeton University, 2018–19

Book

Bending the Rules: Procedural Politicking in the Bureaucracy. 2019. Chicago, IL: University of Chicago Press.

Articles

“Providing Political Guidance? Agency Politicization and ‘As If’ Policymaking.” *Journal of Political Institutions and Political Economy*. Forthcoming

“Congressional Oversight Revisited: Politics and Procedure in Agency Rulemaking.” (with Kenneth Lowande) *Journal of Politics*. Forthcoming.

“Continuity Trumps Change: The First Year of Trump’s Administrative Presidency.” (with Andrew Rudalevige, Sharece Thrower, and Adam Warber). 2019. *PS: Political Science & Politics* 52(4): 613-619.

“Agency Rulemaking in a Separation of Powers System.” (with Charles R. Shipan). 2019. *Journal of Public Policy* 39(1): 89-113.

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“Organizational Capacity, Regulatory Review, and the Limits of Political Control.” (with Alex Bolton and Sharece Thrower). 2016. *Journal of Law, Economics, & Organization* 32(2): 242-271.

“The Limits of Foreign Aid Diplomacy: How Bureaucratic Design Shapes Aid Distribution.” (with Vincent Arel-Bundock and James Atkinson), 2015. *International Studies Quarterly* 59(3): 544-556.

Recent Awards and Media

Kenneth J. Meier Award for the Best Paper in Bureaucratic Politics, Public Administration, or Public Policy, Midwest Political Science Association, 2017

Blogger: Brookings Institution, Center for the Study of Regulation and Markets